Supreme Court, U.S.
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No. 10-

IN THE

Supreme Court of the United States

JAMES A. KAY, JR. AND MARC D. SOBEL,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, following an appellate court mandate affirming an independent administrative agency's finding of regulatory violations by a licensee, the agency has the jurisdiction and legal authority to modify sanctions imposed for the violations, where the sanctions were neither argued by the parties nor addressed by the Court in the appellate proceeding.

2. Whether Constitutional principles of separation of powers are violated when a Congressional statute restricting administrative agency discretion as to judicial mandates of reversal is, contrary to the plain language of the statute, extended to cases involving mandates of affirmance.

PARTIES TO THE PROCEEDING

James A. Kay, Jr., an individual residing in Las Vegas, Nevada, and Marc D. Sobel, an individual residing in Bass Lake California, each holders of land mobile radio licenses, Petitioners.

The Federal Communications Commission, an independent regulatory agency, authorized pursuant to, inter alia, Title III of the Communications Act of 1934, as amended, 47 U.S.C. § 301, et. seq., to license and regulate land mobile radio systems.

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OPINIONS BELOW

The October 19, 2010, Order of the U.S. Court of Appeals for the District of Columbia Circuit, Appendix A, is unreported. The June 1, 2010, *Second Memorandum Opinion and Order* of the Federal Communications Commission, Appendix B, is reported at 25 FCC Rcd 7639. The *Memorandum Opinion and Order* of the Federal Communications Commission, Appendix C, is reported at 22 FCC Rcd 4068.

JURISDICTION

The Judgment of the District of Columbia Circuit, dismissing the appeal, was entered on October 19, 2010. Appendix A. Timely petitions for panel rehearing and rehearing *en banc* were denied on January 14, 2011. Appendices D & E. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

Section 402(h) of the Communications Act of 1934, as amended, provides:

> In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

STATEMENT OF THE CASE

Petitioners seek review of an order (Appendix A) of the United States District Court for the District of Columbia Circuit (Appendix A) dismissing their appeal from orders (Appendix B & C) of the Federal Communications Commission ("FCC" or "Commission") dismissing their request for modification of the sanctions imposed in a prior enforcement proceeding.

In enforcement proceedings the FCC found that Petitioners had engaged in an unauthorized transfer of control, by virtue of a 1994 management agreement, and lacked candor in connection with supporting affidavits in a 1995 pleading. *James A. Kay, Jr.*, 17 FCC Rcd 1834 (2001), *recon. denied*, 17 FCC Rcd 8554 (2002) and *Marc Sobel*, 17 FCC Rcd 1872, *recon. denied*, 17 FCC Rcd 8562 (2002), *further recon. denied*, 19 FCC Rcd 801 (2004). Considering all the circumstances, however, the Commission concluded that the violations were not disqualifying and did not warrant revoking all of Petitioners' authorizations. The agency fashioned a "limited" sanction, revoking only the Petitioners' 800 MHz authorizations, deeming this adequate to deter any future misconduct. Petitioners retained their authorizations for UHF (470-512 MHz) facilities. *Marc Sobel*, 17 FCC Rcd at 1893-1894; *James Kay*, 17 FCC Rcd at 1864-1865. Deterrence of future misconduct was the sole stated purpose for the partial license revocation sanction. "In this case, we find that loss of ... interests involving the 800 MHz band alone will be an adequate deterrent." *James Kay*, 17 FCC Rcd at 1864-1865; *Marc Sobel*, 17 FCC Rcd at 1893-1894, *quoting Policy Regarding Character Qualifications*, 102 FCC 2d 1179, 1229 (1986).

Petitioners appealed, asserting insufficient record evidence to support the finding of violations. The U.S. Court of Appeals for the District of Columbia Circuit affirmed the Commission, finding sufficient evidence in the administrative record to justify the unauthorized transfer and lack of candor conclusions. *Kay v. FCC*, 396 F.3d 1184 (D.C. Cir. 2005), *cert. denied*, 546 U.S. 871 (2005). The appeal addressed only the finding that Petitioners had committed the charged violations. Petitioners did not argue and the appellate Court did not address the limited revocation sanction.

On August 3, 2005, Petitioners filed with the FCC a Motion to Modify Sanction. Petitioners proposed that, as an alternative to the loss of their 800 MHz licenses, they would contribute a block of UHF (470-512 MHz) spectrum to be used by first responders and public safety agencies in the Los Angeles area. Petitioners also offered to make a substantial monetary contribution to the U.S. Treasury. Several public safety entities submitted supporting comments, advising the Commission that the proposed alternative sanction would result in much needed UHF spectrum being used to improve first responder communications and interoperability of public safety entities throughout the Los Angeles area.

Petitioners made it clear that they were not challenging the judgment on the merits of the enforcement orders or the appellate ruling. They simply proposed an alternative sanction that (a) would not affect in any way the judgment on the merits, and therefore would fully consistent with the judicial mandate, (b) would satisfy the stated purpose of the original sanction, *i.e.*, deterrence of future misconduct, and (c) and would provide significant public interest

benefits—in particular with respect to first responder and other public safety communications in the Los Angeles area—that are absent from the original sanction. The Commission nevertheless mischaracterized the Motion to Modify Sanction as an untimely request to reconsider the orders in the enforcement proceeding. The Commission denied the request, citing "considerations of administrative and judicial finality." Appendix C at 16a. The Commission determined that it was without jurisdiction or authority to consider the alternative sanction proposal because the revocation orders were final, judicial review had been completed, and the appellate court mandate had issues. *Id.*, *citing Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 277 & 281-282 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). Petitioners' appeal to the D.C. Circuit was dismissed on essentially the same grounds.

REASONS FOR GRANTING PETITION

The decisions below are in error and should be reviewed and reversed by this Court. The assertion that Petitioners sought untimely reconsideration of the administrative orders and appellate court judgment in the enforcement proceedings is erroneous. The decisions below misconstrue the nature of judicial review of the actions of independent regulatory agencies, contradict the rule established by this Court in *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940), and constitute an improper judicial interference with the powers delegated to the FCC by Congress.

A. THE ALTERNATIVE SANCTION PROPOSAL DID NOT CONTRADICT THE APPELLATE COURT MANDATE AND WAS THUS ERRONEOUSLY CHARACTERIZED AS AN UNTIMELY REQUEST FOR RECONSIDERATION.

The Motion to Modify Sanction was not a request to reconsider the enforcement orders and therefore was not barred by the judicial mandate affirming those orders. Under the general principles of administrative law, a reviewing "court has power to pass judgment upon challenged principles of law insofar as they are relevant to the disposition made by the Commission." *Federal Power Commission v. Pacific Power & Light Co.*, 307 U.S. 156 (1939), *cited by Pottsville*, 309 U.S. at 145. As to such questions of law resolved by the Court, "a judgment rendered will be a final and indisputable basis of action as between" the agency and the parties. *ICC v. Baird*, 194 U.S. 25, 38 (1904).

There are of course limits on the discretion of administrative agencies, and one such limit is an obligation to comply with judicial mandates issued by court's having jurisdiction to review agency actions. But a mandate is essentially a rule of law. "The mandate of a federal appellate court 'establishes the law binding further action in the litigation by another body subject to its authority.'" *Finberg v. Sullivan*, 658 F.2d 94, 97 n.5 (9th Cir. 1980) (*quoting City of Cleveland v. FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977)). Like any other rule of law, its proper application requires reasoned interpretation to discern the intent of its maker. In determining whether a contemplated action is proscribed or permitted by an appellate judgment,

"the court's opinion should be consulted to ascertain the intent of the mandate." *Finberg v. Sullivan*, 658 F.2d at 97 n.5 (9th Cir. 1980) (*citing In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895); *FTC v. Standard Educational. Society*, 148 F.2d 931, 932 (2d Cir. 1945); *Miller v. United States*, 173 F.2d 922 (6th Cir. 1949).

In the opinion affirming the enforcement orders, the D.C. Circuit made a single determination of law, namely, that the Commission's finding of regulatory violations was adequately supported by "substantial evidence" in the record. The partial revocation sanction is mentioned only as a neutral statement of the factual and procedural history of the case. *Kay v. FCC*, 396 F.3d at 1185-1188. Based on the Court's own explanation of its decision, therefore, the only "error of law" examined was whether the administrative record was sufficient to justify the finding of violations under the "substantial evidence" test. That is the mandate. The modification of the sanction, as proposed, does not transgress the mandate. It does not alter the findings of violations, nor does it challenge such finding. The alternative sanction would be imposed precisely because of those violations, and it would be fashioned in a manner the Commission determines will adequately deter future misconduct. Thus, not only is the finding of violations (within the scope of the Court's mandate) not altered, even the stated purpose, i.e., deterrence, for the original mandate (*not* within the scope of the Court's mandate) is also preserved.

B. EVEN ASSUMING THE ALTERNATIVE SANCTION PROPOSAL WERE WITHIN THE SCOPE OF THE JUDICIAL MANDATE, THE FCC RETAINS THE JURISDICTION AND AUTHORITY TO MODIFY THE SANCTION PURSUANT TO CONGRESSIONAL DELEGATION OF LEGISLATIVE POWERS.

Federal appellate courts' supervisory authority over administrative agency actions is significantly restricted by comparison to their plenary authority over lower courts. As Mr. Justice Frankfurter, writing for the Supreme Court in *FCC v. Pottsville Broadcasting Co.*, explained, a "much deeper issue" arises when the appellate court judgment is "not a mandate from court to court but from a court to an administrative agency." 309 U.S. 134, 141 (1940). This is a fundamental distinction grounded in Constitutional principles of separation of powers. The courts exercise Article III powers conferred directly on the judiciary by the Constitution. Federal Courts other than the Supreme Court are established and their jurisdiction defined by Congressional legislation, but once in existence, the judicial power they exercise comes not from Congress, but from Article III through the Supreme Court: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST., Art. III § 1. Independent administrative agencies, such as the FCC, exercise such Article I powers as delegated to them by Congress. They are charged with "the enforcement of legislative policy through administrative control" *Pottsville*, 309 U.S. at 141. An appellate court has no more authority to restrict the discretionary powers delegated to an agency by the legislature than it would to encroach powers exercised

directly by Congress. "Congressional power, exercised through a delegated agency, can be controlled [only] within the limited scope of 'judicial power' conferred by Congress under the Constitution." *Id.*

The Commission, in rejecting the alternative sanction proposal, relied on *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, (D.C. Cir. 1971). The D.C. Circuit there opined that the "sweep" of the Supreme Court opinion in *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, was "cut back" by the subsequent enactment of Section 402(h) of the Communications Act. 47 U.S.C. § 402(h). While that is an accurate statement, it was too broadly applied in the *Greater Boston* case itself, and certainly in the decisions below.

Section 402(h) of the Communications Act, added by Congress in 1952, provides:

> In the event that the court shall render a decision and enter *an order reversing the order of the Commission*, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

47 U.S.C. § 402(h) (emphasis added). The mandate in the appeal from the enforcement orders was a judgment *affirming*, not reversing, orders of the Commission. Section 402(h) is thus inapplicable.

In *Greater Boston* the court responded to the argument that Section 402(h) applies only in the case of a reversal and remand, stated: "We see no basis for inferring that this law, passed to restrict FCC latitude to reopen the record in case of reversal, was meant to augment that latitude in case of affirmance." 463 F.2d at 282. But there is no need to infer such restriction. It is expressly stated in the opening phrase of subsection (h): "In the event that the court shall render a decision and enter *an order reversing the order of the Commission* ...." 47 U.S.C. 402(h) (emphasis added). With all due respect to Judge Leventhal, when the scope of a statute is clearly limited by the plain language of the statute itself, there is no basis for inferring that Congress wished for the limitation to be ignored. It would be better to heed the sage advice of Mr. Justice Frankfurter: "[W]hen the legislative history is doubtful, go to the statute." *Greenwood v. United States*, 350 U.S. 366, 374 (1956)

The principles of law enunciated by *Pottsville* and its progeny—e.g., that appellate courts have limited authority over independent agencies as compared with lower courts; that the scope of appellate court review in administrative cases is limited to correcting violations of mandatory law, failure regarding non-discretionary actions, or abuse of discretion; that the Court's do not have authority to meddle in the agency's discretionary actions exercising delegated Congressional powers to regulate; etc.—were not altered by Section 402(h), nor were they intended to be. Insofar as such principles are grounded in the doctrine of separation of powers or other Constitutional principles, moreover, neither administrative agency nor appellate court orders can alter them.

As this Court explained in *Pottsville*:

> an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. ... The Commission's responsibility at all times is to measure [its actions] by the standard of "public convenience, interest, or necessity." ... [To hold otherwise] would mean that for practical purposes the contingencies of judicial review and of litigation, rather than the public interest, would be decisive factors.

Pottsville, 309 U.S. at 145-146 (citing *Pacific Power & Light*, 307 U.S. 156, and *Ford Motor Co. v. NLRB*, 305 U.S. 364 (1939)).

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED OCTOBER 19, 2010

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1155

September Term 2010

FCC-10-104

Filed On: October 19, 2010

James A. Kay, Jr. and Marc D. Sobel,

Appellants

v.

Federal Communications Commission,

Appellee

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the motion to dismiss case or for summary affirmance, the opposition thereto, and the

reply; and the motion to defer filing of certified index to record, it is

ORDERED that the motion to dismiss be granted. "[A] petition seeking review of an agency's decision not to reopen a proceeding is not reviewable unless the petition is based upon new evidence or changed circumstances." *Southwestern Bell Tel. Co. v. FCC*, 180 F.3d 307, 311 (D.C. Cir. 1999); *see ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987). Despite appellants' representations that they do not challenge the validity of the Commission's determinations in its original decisions, their request for alternative sanctions would require the Commission to reopen the proceedings against them and reconsider the sanctions already imposed, and appellants have not asserted that their request is based upon new evidence or changed circumstances. The court therefore lacks jurisdiction to review the Commission's denial of appellants' request. The court also lacks jurisdiction to review the Commission's denial of appellants' "successive request[] for reconsideration." *Sendra Corp. v. Magaw*, 111 F.3d 162, 167 (D.C. Cir. 1997). It is

FURTHER ORDERED that the motion to defer filing of certified index to record be dismissed as moot.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1155

September Term 2010

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

APPENDIX B — SECOND MEMORANDUM OPINION AND ORDER BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, ADOPTED JUNE 1, 2010, RELEASED JUNE 2, 2010

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

WT Docket No. 94-147

In the Matter of

JAMES A. KAY, JR.

Licensee of One Hundred Fifty Two
Part 90 Licenses in the
Los Angeles, California Area

WT Docket No. 97-56

MARC SOBEL

Applicant for Certain Part 90 Authorizations
in the Los Angeles Area and Requestor of
Certain Finder's Preferences

MARC SOBEL AND MARC SOBEL
D/B/A AIR WAVE COMMUNICATIONS

Licensee of Certain Part 90 Stations in the
Los Angeles Area

Appendix B

SECOND MEMORANDUM OPINION AND ORDER

Adopted: June 1, 2010 **Released: June 2, 2010**

By the Commission:

I. INTRODUCTION

1. On April 12, 2010, the Commission released a Memorandum Opinion and Order denying the request by James A. Kay and Marc D. Sobel to reconsider the Commission's decision to revoke specified 800 MHz radio licenses as a sanction for unlawful conduct.[1] The April 12 Order specified that Kay and Sobel were authorized to continue operation of their stations only "until 12:01 A.M. on the 11th day after release of this memorandum opinion and order." *Id.* at ¶9. On April 21, 2010, the day before the termination of their authorizations, Kay and Sobel filed a "Petition for Reconsideration" of the April 12 Order, a "Motion for Stay" of that order pending a decision on the reconsideration petition, and a "Motion for Continuation of Operating Authority." By this order, we hereby dismiss the repetitious petition for reconsideration. We also explain that if the petition were not procedurally defective, we would deny it on the merits. In light of that disposition, we dismiss as moot the motion for stay and the motion for continuation of operating authority.

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1. James A. Kay, Jr., *Memorandum Opinion and Order*, FCC No. 10-55 (April 12, 2010) ("April 12 Order").

Appendix B

II. BACKGROUND

2. In 1994 and 1997 we designated for revocation hearings certain licenses held by Kay and Sobel, and in 2002 we ordered that the licenses be revoked on findings that the licensees had transferred control of their licenses without authority to do so and had lacked candor toward the Commission.[2] In 2005, the Court of Appeals affirmed the revocation orders,[3] and the Supreme Court denied review that year.[4]

3. Despite having lost their challenge to the orders directing revocation of their licenses, Kay and Sobel filed shortly thereafter a "Motion to Modify Sanctions" asking that we reconsider the decision to order revocation and proposing as an alternative penalty the surrender of other licenses in the UHF band and the payment of a fine. The April 12 Order denied that motion and directed Kay and Sobel to cease operations on their frequencies. Accordingly, consistent with the April 12 Order, the Wireless Telecommunications Bureau updated our Uniform Licensing System on April 23, 2010, to reflect the cancellation of the licenses at issue.

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2. *James A. Kay, Jr.*, 17 FCC Rcd 1834 (2002), *recon. granted in part and denied in part*, 17 FCC Rcd 8554 (2002); *Marc Sobel*, 17 FCC Rcd 1872 (2002), *recon. denied*, 17 FCC Rcd 8562 (2002), *further recon. denied*, 19 FCC Rcd 801 (2004).

3. *Kay v. FCC*, 396 F.3d 1184 (D.C. Cir. 2005).

4. *Kay v. FCC*, 126 S.Ct. 176 (2005).

Appendix B

III. DISCUSSION

4. Kay and Sobel seek reconsideration of the April 12 Order, but their request is repetitious because it simply asks again for relief already denied them on reconsideration.[5] Although Kay and Sobel insist that the self-styled "Motion to Modify Sanctions" was not a petition for reconsideration,[6] the decision to revoke the licenses was an integral part of the underlying proceeding. A request that the Commission re-open the matter and re-visit the carefully considered sanction determination is a petition for reconsideration no matter what its caption.[7] The rule against repetitious petitions for reconsideration is designed precisely to deter disappointed parties from asking for the same relief again and again in the hope that they will eventually get a different answer. We

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5. *See* 47 C.F.R. § 1.106(k)(3) ("A petition for reconsideration of an order which has been previously denied on reconsideration may be dismissed ... as repetitious.").

6. *See, e.g.*, Petition for Reconsideration at 5.

7. *See Minnesota PCS Limited Partnership*, 17 FCC Rcd 126, 127 ¶4 (CWD 2002) ("The Commission ... is not bound by the title that a filing party gives a pleading."). Indeed, the "Motion for Modification of Sanctions" was itself subject to dismissal on timeliness grounds. Rule 1.106(f) establishes a 30-day deadline for petitions for reconsideration, but the motion was filed approximately 3½ years after the close of administrative proceedings. Kay and Sobel frankly acknowledge their lateness. Petition for Reconsideration at 5 ("[t]he Licensees recognize that the time for challenging the Commission's 2002 decisions has long passed").

therefore dismiss the pending petition for reconsideration as repetitious.[8]

5. We would deny the petition for reconsideration even if we were not dismissing it. The gist of the petition for reconsideration is that the April 12 Order failed to consider Kay and Sobel's arguments on their merits. That claim is plainly incorrect. The April 12 Order determined that considerations of administrative and judicial finality outweighed any of the asserted benefits that may have resulted from Kay and Sobel's proposed alternative to the revocation of their licenses. Specifically, we held that Kay and Sobel had "fail[ed] to demonstrate factors sufficiently extraordinary to upset the principles of ... finality," because they had not shown – or even attempted to show – that revoking their licenses would "constitute an injustice."[9] We also rejected Kay and Sobel's claims that rescinding the revocation order would result in net benefits to the public, finding instead that such an action would not "yield such extraordinary public interest benefits as to justify upsetting considerations of administrative finality."[10] Kay and Sobel thus are wrong that the April 12 Order addressed only whether to seek recall of the Court of Appeals' mandate. Although that issue played a role in our decision, it was but one of several factors we balanced

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8. We take this action ourselves rather than delegating the matter to the Staff in order to achieve absolute finality in this matter.

9. April 12 Order at ¶6.

10. *Ibid.*

in reaching our decision to deny relief.[11] Kay and Sobel's real complaint is that we struck a balance of considerations different from the one they asked for.

6. Nor were Kay and Sobel entitled to any greater explanation than we provided in the April 12 Order. This proceeding was terminated at the administrative level in 2002 and at the judicial level in 2005. When the Supreme Court denied certiorari of the Court of Appeals' decision affirming the revocation orders (Kay and Sobel never challenged the penalty, only the evidence supporting the Commission's factual findings), the matter became final and no longer subject to review. Otherwise, parties could indefinitely prolong proceedings, even after judicial review, by filing – as Kay and Sobel have done here – repetitive petitions, however captioned, for further review.[12]

7. That said, we will provide a brief discussion of the policy interests at stake here. We disagree with Kay and Sobel's contention that rescinding the revocation order and imposing an alternative punishment would serve the public

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11. We note that, despite Kay and Sobel's insistence that the mandate is little more than a meaningless piece of paper, after the Court of Appeals' *James A. Kay, Jr.* decision, Kay and Sobel filed no fewer than three motions asking the Court to stay the mandate.

12. *Cf. I.C.C. v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) (it is "the most plebeian statutory construction to find implicit in the 60-day limit upon judicial review a prohibition against the agency's permitting, or a litigant's achieving, perpetual availability of review by the mere device of filing a suggestion that the agency has made a mistake and should consider the matter again.").

interest. We find that the public interest balance does not tip in their favor. Although some public safety users in the Los Angeles area might benefit from additional UHF spectrum made available by Kay and Sobel's proposal, the Commission's Public Safety and Homeland Security Bureau recently issued an order which dramatically increased amount of available public safety UHF spectrum in the Los Angeles area.[13] In light of this action, Kay and Sobel's proposal would provide only marginal benefit. On the other hand, restoring the Kay and Sobel licenses would further complicate reconfiguration of the 800 MHz band in southern California, which is already complex due to the proximity of the Mexican border and the concomitant restrictions on spectrum usage in the area.[14] Moreover, restoration of Kay and Sobel's licenses would diminish the amount of available 800 MHz spectrum in the border region, thus leaving public safety users with access to fewer useable channels.

8. We must also weigh the scant public interest "benefits" against our interest in the integrity of our enforcement process and the finality of our judgments. Kay and Sobel were found to have violated the rule that prevents the unauthorized transfer of control of spectrum and to have lied about it to the Commission. Those are serious infractions that disqualified Kay and Sobel

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13. *County of Los Angeles, Calif.*, 23 FCC Rcd 18389 (PSHSB 2008).

14. *See* 47 C.F.R. § 90.619 (Operations within the U.S./Mexico and U.S./Canada border areas).

from holding the licenses at issue.[15] We do not revoke licenses lightly, and while we might consider revisiting a final, judicially affirmed judgment in extraordinary circumstances, Kay and Sobel have come nowhere near justifying the reversal of a considered decision rendered eight years ago. To grant relief here would invite every licensee subject to a severe sanction to engage in prolonged dickering over the penalty.

9. Because we are dismissing the petition for reconsideration, both the motion for stay and the motion for continuation of operating authority are moot and we dismiss them.

10. It is our understanding that in the five years since we ordered that their licenses be revoked, Kay and Sobel have continued to earn substantial license-related fees. That is enough of a windfall; this matter must now come to an end. Kay and Sobel forfeited their opportunity to hold the licenses at issue when they violated our rules, and it is high time that they face the consequences of their actions. We direct the Enforcement Bureau to ensure that Kay and Sobel in fact have desisted from using their formerly licensed frequencies, and if the Bureau determines otherwise, to take immediate action, including forfeiture proceedings and/or proceedings to revoke any other licenses held by Kay or Sobel.

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15. *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1210-11 (1985), *recon. denied*, 1 FCC Rcd 421 (1986), *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991).

IV. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED, that the Petition for Reconsideration filed April 21, 2010, IS DISMISSED as repetitious.

12. IT IS FURTHER ORDERED, that the Motion for Stay filed April 21, 2010, IS DISMISSED as moot.

13. IT IS FURTHER ORDERED, that the Motion for Continuation of Operating Authority filed April 21, 2010, IS DISMISSED as moot.

14. IT IS FURTHER ORDERED, that copies of this order SHALL BE SERVED on James A. Kay, Jr., Marc D. Sobel, and the Enforcement Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX C — MEMORANDUM OPINION AND ORDER BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, ADOPTED AND RELEASED APRIL 12, 2010

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

WT Docket No. 94-147

In the Matter of

JAMES A. KAY, JR.

Licensee of One Hundred Fifty Two
Part 90 Licenses in the
Los Angeles, California Area

WT Docket No. 97-56

MARC SOBEL

Applicant for Certain Part 90 Authorizations
in the Los Angeles Area and Requestor of
Certain Finder's Preferences

MARC SOBEL AND MARC SOBEL
D/B/A AIR WAVE COMMUNICATIONS

Licensee of Certain Part 90 Stations in the
Los Angeles Area

Appendix C

MEMORANDUM OPINION AND ORDER

Adopted: April 12, 2010 **Released: April 12, 2010**

By the Commission:

1. James A. Kay, Jr. (Kay) and Marc D. Sobel (Sobel) (collectively Petitioners) ask the Commission to reconsider decisions revoking Petitioners' 800 MHz radio licenses by rescinding the revocations and substituting an alternative set of sanctions proposed by Petitioners. Because Petitioners have failed to show good cause for the Commission to disturb a decision that has become final and to reopen this proceeding, in which the court of appeals has affirmed the Commission's orders and issued its mandate, we deny their request.

I. BACKGROUND

2. In companion decisions released on January 25, 2002, the Commission found that Kay and Sobel had participated in the unlawful transfer of control of certain 800 MHz stations licensed to Sobel and lacked candor in their submissions to the Commission. The Commission therefore determined that it would be appropriate to revoke their licenses in the 800 MHz service.[1]

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1. *See James A. Kay, Jr.*, 17 FCC Rcd 1834 (2002), *recon. granted in part and denied in part*, 17 FCC Rcd 8554 (2002); *Marc Sobel*, 17 FCC Rcd 1872 (2002), *recon. denied*, 17 FCC Rcd 8562 (2002), *further recon. denied*, 19 FCC Rcd 801 (2004). Additionally, the Commission denied Petitioners' applications for other 800 MHz licenses and their finder's preference requests in the 800 MHz service. In each of the decisions, the Commission provided: "the licensee IS AUTHORIZED to continue operation

3. The United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's decisions on February 1, 2005 and denied rehearing on April 5, 2005.[2] The United States Supreme Court then denied certiorari on October 3, 2005.[3] On December 5, 2005, the D.C. Circuit denied a motion for further stay of the mandate and issued its mandate.[4]

4. On August 3, 2005, Petitioners filed a Motion to Modify Sanction in which they asked the Commission to "rescind the license revocations, substituting for them a modified sanction package . . . ."[5] Pursuant to their proposed "modified sanction package," Petitioners would contribute a block of spectrum in the 470-512 MHz band for public safety use and would also make payments to the Treasury totaling $750,000. Petitioners contend that the proposed "modified sanction package" would better serve the public interest than the revocation of their 800 MHz licenses. Petitioners also filed various motions for stay and for an extension of operating authority while their Motion to Modify Sanction was being considered.[6]

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of the stations until . . . final disposition of all administrative and/or judicial appeals." 17 FCC Rcd at 1866 ¶ 109 and 1895 ¶ 90.

2. *Kay v. FCC*, 396 F.3d 1184 (D.C. Cir. 2005).

3. *Kay v. FCC*, 126 S.Ct. 176 (2005).

4. *Kay v. FCC*, No. 02-1175 (D.C. Cir. Dec. 5, 2005) (order).

5. Motion at 2. Petitioners added further details to their proposal in filings on September 14, 2005 and October 24, 2005.

6. These are: Motion for Stay Pending Action on Motion to Modify, filed August 23, 2005, and a Motion for Extension of Operating Authority, filed October 17, 2005, and Motions for

II. DISCUSSION

5. The propriety of taking further action in this proceeding is circumscribed by considerations of administrative and judicial finality. The orders revoking Petitioners' 800 MHz licenses are final orders of the Commission. The time for reconsideration of these orders has long passed;[7] judicial review has been completed; and the mandate of the appellate court has issued. In accordance with that mandate, we hereby uphold the revocation of Petitioners' 800 MHz licenses.[8]

6. In this case, Petitioners have not shown good cause for us to request that the D.C. Circuit recall its mandate. The D.C. Circuit has stated:

> A mandate once issued will not be recalled except by order of the court for good cause shown. The good cause requisite for recall of mandate is the showing of need to avoid injustice.[9]

Further Extension of Operating Authority, filed January 17, 2006; April 12, 2006; July 19, 2006; October 12, 2006; January 9, 2007; April 11, 2007; July 10, 2007; October 9, 2007; January 18, 2008; April 17, 2008; July 11, 2008; September 15, 2008; December 11, 2008; March 12, 2009; June 8, 2009; September 15, 2009; December 9, 2009; and March 1, 2010.

7. *See* 47 C.F.R. § 1.106(f).

8. *See Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 281-82 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

9. *See Greater Boston*, 463 F.2d at 277, *quoting Hines v. Royal Indemnity Co.* 253 F.2d 111, 114 (6th Cir. 1958) [internal quotation marks omitted].

While Petitioners contend that adoption of their "modified sanction package" would serve the public interest, they fail to demonstrate factors sufficiently extraordinary to upset the principles of administrative and judicial finality and for the Commission to seek recall of the court's mandate. In particular, they have not demonstrated that implementing the sanctions specified in the Commission's existing decisions, which have been upheld by the courts on their merits, would constitute an injustice. Indeed, Petitioners do not even attempt to show that modifying the sanctions imposed by the Commission is necessary to avoid injustice. We also note that their modified sanctions package does not yield such extraordinary public interest benefits as to justify upsetting considerations of administrative finality.

7. In the absence of good cause to revisit the existing decisions, we will deny Petitioners' motion and give effect to the court's mandate. Since the final disposition of all administrative and judicial appeals of our 2002 decisions has now occurred, consistent with the terms of those decisions, Petitioners must stop operation of the stations for which its licenses were revoked.

III. ORDERING CLAUSES

8. ACCORDINGLY, IT IS ORDERED, that the Motion to Modify Sanction, filed August 3, 2005, IS DENIED.

9. IT IS FURTHER ORDERED, that the Motion for Extension of Operating Authority, filed October 17, 2005, the Motions for Further Extension of Operating Authority, filed January 17, 2006, April 12, 2006, July 19, 2006, October 12, 2006, January 9, 2007, April 11, 2007,

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July 10, 2007, October 9, 2007, January 18, 2008, April 17, 2008, July 11, 2008, September 15, 2008, December 11, 2008, March 12, 2009, June 8, 2009, September 15, 2009, December 9, 2009, and March 1, 2010, by James A. Kay, Jr. and Marc D. Sobel, ARE GRANTED in part and MODIFIED in part and that the licensees ARE AUTHORIZED to continue operation of the stations as specified in the previous orders of the Commission until 12:01 A.M. on the 11th day after release of this memorandum opinion and order.[10]

10. IT IS FURTHER ORDERED, that the Motion for Stay Pending Action on Motion to Modify, filed August 23, 2005, by James A. Kay, Jr. and Marc D. Sobel, IS DISMISSED as moot.

11. IT IS FURTHER ORDERED, that copies of this order SHALL BE SERVED on James A. Kay, Jr., Marc D. Sobel, and the Enforcement Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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10. Petitioners sought extensions until June 10, 2010. We modify the requested time period to better comport with our disposition herein.

APPENDIX D — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JANUARY 14, 2011

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1155

September Term 2010

FCC-10-104

Filed On: January 14, 2011

James A. Kay, Jr. and Marc D. Sobel,

Appellants

v.

Federal Communications Commission,

Appellee

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the petition for rehearing, it is **ORDERED** that the petition be denied.

Appendix D

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/_____
Lynda M. Flippin
Deputy Clerk

APPENDIX E — ORDER DENYING PETITION FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DATED JANUARY 14, 2011

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1155

September Term 2010

FCC-10-104

Filed On: January 14, 2011

James A. Kay, Jr. and Marc D. Sobel,

Appellants

v.

Federal Communications Commission,

Appellee

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

Appendix E

ORDER

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/_____
Lynda M. Flippin
Deputy Clerk

APPENDIX F — RELEVANT STATUTORY PROVISION INCLUDED

§ 402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise

statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28.

(e) Intervention

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of title 5.

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission,

it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for costs

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.